IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-793

JOHN D. EHRLICHMAN,

Petitioner,

v.

UNITED STATES OF AMERICA

No. 76-1081

JOHN N. MITCHELL and HARRY R. HALDEMAN,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

Wm. Snow Frates	Eugene Gressman	John J. Wilson
Andrew C. Hall	William G. Hundley	Frank H. Strickler
Stuart Stiller	Plato Cacheris	Ross O'Donoghue
Lawrence H. Schwartz	Cary Mark Feldman	
Counsel for Petitioner Ehrlichman	*Counsel for Petitioner Mitchell*	*Counsel for Petitioner Haldeman*

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-793

JOHN D. EHRLICHMAN,

Petitioner,

v.

UNITED STATES OF AMERICA

No. 76-1081

JOHN N. MITCHELL and HARRY R. HALDEMAN,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

The Opposition Brief of the United States, by raising more questions than it answers, dramatically underscores the appropriateness of granting certiorari in this, the most celebrated and publicized criminal trial in American history.

While the Government has termed the issues presented for review by petitioners as "common and familiar" (Opp. Br. 12), Mr. Justice Holmes has reminded us that "It is hard to exhaust the possibilities of a general proposition." *Jaster v. Currie*, 198 U.S. 144, 148 (1905). This trial, conceded to be "profoundly important" (Opp. Br. 12), has indeed opened new vistas on the "common and familiar" principles applicable to all criminal proceedings. And it is those new vistas that the Government has not recognized, questions that unless answered by this Court will forever becloud these convictions with doubt that they were the products of a fair trial.

1. *Is there a public interest in determining whether these petitioners received a fair trial?*

The Government's implicitly negative answer to that question is belied by the actions of this Court. On March 28, 1977, the Court granted certiorari in No. 76-944, *Nixon v. Warner Communications, Inc.* That action highlighted anew this Court's continuing concern that "the fundamental demands of due process of law in the fair administration of criminal justice," *United States v. Nixon*, 418 U.S. 683, 713 (1974), be studiously obeyed in the instant Watergate prosecution.

That concern was first expressed prior to the trial of the petitioners, the Court emphasizing in the *Nixon* tapes case that it is "the manifest duty of the courts to vindicate" these petitioners' due process, confrontation and compulsory process rights under the Fifth and Sixth Amendments, 418 U.S. at 711. That concern is also being expressed in this post-trial period, even in collateral proceedings like the *Warner Communications* case. There this Court will be reviewing the problems associated with the

proposed commercial exploitation of the very tapes that were ordered produced in the *Nixon* tapes case and that were used to secure the conviction of these petitioners. Included in that review will be the concerns expressed by Judge Sirica that mass marketing and distribution of these tapes "could prejudice the rights of the Watergate defendants should their convictions be reversed and a new trial be required."[1]

The time has now come in this, the last and the foremost of the Watergate cases, to assess the trial frontally, rather than peripherally. The need is now evident to give definitive assurance to the public that the trial that so occupied their attention either was or was not in accord with "the fundamental demands of due process of law in the fair administration of justice." 418 U.S. at 713.

2. *Can a fair trial be had at the culmination of pervasive and prolonged pre-trial publicity as to a nationally traumatic scandal at the highest level of government?*

The Government not only provides no answer to this question but it refuses to acknowledge that the question exists. The problem, briefly restated, is whether the Watergate publicity was so pervasive, so concentrated, so universal, so subliminal, so unprecedented, and so incapable

---

[1] *United States v. Mitchell*, Nos. 75-1409, 75-1410, C.A.D.C., Oct. 26, 1976 (slip opinion, p. 8), referring to Judge Sirica's opinion in 397 F. Supp. 186, 187 (D.D.C. 1975).

See also this Court's notation of probable jurisdiction on November 29, 1976, in No. 75-1605, *Nixon v. Administrator of General Services*, involving the constitutionality of the Presidential Recordings and Materials Preservation Act. Under § 104(a) of that Act, regulations governing public access to such materials as the Watergate tapes must take into account "the need to protect every individual's right to a fair and impartial trial."

of being captured by statistical analysis or by *voir dire* examination that a trial that was in itself the culmination of that historic publicized event could be other than unfair.

The Government simply cannot bring itself to acknowledge what all who lived through the Watergate era know to be true – that the pre-trial publicity about Watergate was absorbed, as if by osmosis, into the consciousness and subconsciousness of virtually all American adults. To read the Government's brief, and indeed the opinion below, one would think that Watergate engendered nothing more than a spate of "straight news stories," much of it consistent with petitioners' defenses and containing no "sustained, highly inflammatory publicity about past criminal records, confessions or other blatantly prejudicial allegations." (Opp. Br. 15-16). And one would think from the Government's laundered account (Opp. Br. 16) that Watergate was a rather dull and technical white-collar crime that could not compete for public attention with such illustrious "crimes of violence and passion, which often have an unusual propensity to arouse and inflame passions, spread fear in the community and encourage emotional cries for retribution" as those involved in *Irvin, Rideau* and *Sheppard.*

In sum, there is not one word in the Government's brief or in the opinion below that can assure the American public that these convictions were other than the product of the massive media accounts of an event that shook the very foundations of the American form of government. Under the steady barrage of television, radio, newspaper, magazine and other publicity, however "straight" or accurate the accounts may have been, the mental passions and feelings of all Americans were aroused as never before in history.

That is the context in which this Court must now address the fairness of this most momentous trial. One need contrast only the relative calm of the present post-Watergate era with the fervor that attended this trial – which occurred hard upon the resignation and pardon of the alleged co-conspirator, President Nixon – to appreciate the nature of the assessment to be made.

3. *Was it discriminatory and unfair to refuse to formulate and apply supervisory standards in assessing the fairness of petitioners' trial?*

Significantly, the Government does not attempt to answer that question. In direct conflict with decisions of this Court and of other circuits, the court below has singled out these petitioners and discriminatorily refused to formulate and apply to them supervisory standards for assessing the fairness of their trial. Such refusal cannot be squared with this Court's prior admonition in the *Nixon* tapes case that one of the manifest duties of the courts in this proceeding is to ensure that the demands of "the fair administration of criminal justice," 418 U.S. at 713, have been met.

The thrust of the Government's position on the lower court's discriminatory default in this respect appears to be twofold: (1) the petitioners are mistakenly accused of maintaining that the default occurred merely because the lower court "failed to reverse their convictions without regard to demonstrable prejudice" (Opp. Br. 18), and (2) the petitioners are mistakenly accused of advocating an "invariable" supervisory rule requiring "an extended continuance in all cases involving substantial pre-trial publicity" (Opp. Br. 18). Apart from the misstatement of petitioners' positions, these assertions only add further fuel to the certiorari flames.

(1) Part of the problem in formulating a supervisory standard in these circumstances may indeed be, as the Government suggests, the need for "demonstrable prejudice." Where there is such massive nation-wide publicity of the type engendered by Watergate, where the public's opinion obtained from such publicity may be "so persistent that it unconsciously fights detachment from the mental processes of the average man," *Irvin v. Doud*, 366 U.S. 717, 727 (1961), can there be such a thing as "demonstrable prejudice"? Is this one of those situations, like the exclusion of certain classes from jury selection, where "proof of actual harm, or lack of harm, is virtually impossible to adduce," *Peters v. Kiff*, 407 U.S. 493, 504 (1972), and where the error "does not depend on a showing of prejudice in a particular case," *Ballard v. United States*, 329 U.S. 187, 195 (1966)?

Indeed, the exercise of supervisory power in *Delaney v. United States*, 199 F.2d 107 (C.A. 1st, 1952), to curb the evil of excessive national pre-trial publicity was not accompanied by any proof, or requirement of proof, that actual harm or prejudice had occurred. That fact, moreover, makes the conflict between the decision below and *Delaney* even more acute.

(2) The Government's reference to "demonstrable prejudice" further suggests that prejudice, for purposes of formulating a supervisory standard, may well be a two-way proposition. Should not the prejudice to the defendant (proven or assumed) resulting from the substantial pre-trial publicity be weighed against the prejudice to the prosecution resulting from any continuance or retrial? Significantly, there is not one word in the Government's brief alleging or suggesting that any undue prejudice or disadvantage to the prosecution would have resulted from a continuance when requested – or from a retrial were one to be ordered on these appeals.

(3) The Government's suggestion (Opp. Br. 19) that extended continuances may prejudice the public's right to "a speedy resolution of criminal cases of public moment" does pose a problem worthy of fuller consideration. Where a defendant is a well-known public official, does he have less of a right to a continuance than an ordinary lesser-known individual? Does not the public's right to a speedy disposition of such charges yield to the concept written into the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(8)(A), that a federal judge may grant a continuance

> ". . . on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."

Can it be that the public official's right to a fair trial, through a continuance, must always be sacrificed to what the Government believes to be the public's superior right to a speedy trial?

(4) The Government's continued insistence (Opp. Br. 20) that the court below could properly use the *voir dire* as the sole defense against excessive pre-trial publicity poses several significant problems. No case in this Court has ever suggested that *voir dire* examination is a *per se* substitute for the formulation and application of supervisory standards. The problem is exacerbated here by the fact that the *voir dire* questions were designed to bring out no more than the potential jurors' self-serving denials (a) that any part of the massive publicity stood out in their minds, and (b) that they knew of any reason why they could not vote for a verdict based upon the evidence and the law (see Mitchell Pet. 9-10, n. 5). Such seemingly inadequate *voir dire*, moreover, was conducted by the same trial judge who was under serious charges of bias and prejudice from certain of the petitioners.

If supervisory standards are to be equated with or replaced by an inadequate *voir dire* conducted by an allegedly biased and prejudiced trial judge, a *voir dire* that depends so much in any event upon the personal and subjective reactions of the trial judge, then a major problem in the administration of criminal justice in the federal courts has been created. Such a problem must be explored and resolved by this Court.

4. *Did the ends of justice require a continuance to permit the petitioners to obtain the testimony of President Nixon?*

The Government has claimed (Opp. Br. 23) that continuance was properly denied in the absence of a showing that President Nixon's testimony would be favorable or material to the defense. Whatever the merits of that claim, it is a claim in response to the wrong question.

The basic issue here is whether any prejudice to the prosecution would have ensued from a reasonable continuance to permit President Nixon to regain his health to the point where he could testify – a point he seemingly reached some time ago. Here again, the Government has made no claim whatever that its case would have been prejudiced in the slightest from such a continuance. We thus return full circle to this Court's remarks in the *Nixon* tapes case that, to ensure that justice is done, the courts *in this case* must make compulsory process available "for the production of evidence needed either by the prosecution or by the defense," 418 U.S. at 709.

The Government has cited no case in this Court (Opp. Br. 23) to the effect that the Sixth Amendment right of compulsory process is dependent in these circumstances

solely on proof that the testimony of a temporarily unavailable witness would be favorable to the defense. The materiality and significance of the testimony of a former President of the United States – particularly in the context of the Watergate prosecution – would appear to pose this continuance problem in a form not admitted or addressed by the Government or by the court below.

5. *Was the use of petitioner Mitchell's testimony before congressional committees consistent with his right to remain silent so as to ensure his right to a fair trial?*

The Government (Opp. Br. 26-28) seeks to answer that question by the pejorative technique of accusing petitioner Mitchell of putting the privilege against self-incrimination into "a novel cast" and calling it a "supposed" right to remain silent in the name of preserving his right to a fair trial.

The Government's technique only augments the importance and need for resolution of this novel problem. None of the cases it cites has the remotest connection with the "right to remain silent" that the petitioner Mitchell has erected. Of course all citizens have a duty to cooperate with congressional committees. Of course those who appear may assert their Fifth Amendment privilege. But it has not yet been determined by this Court whether a third factor becomes evident – the right to remain silent to preserve the right to a fair trial – when the witness before the committee is also about to undergo a criminal prosecution at the hands of another arm of the Government, the prosecuting arm.

The problem has been succinctly put by the First Circuit in the *Delaney* case, 199 F.2d at 114; quoted in Mitchell Pet. 25. The problem there discussed has simply

been ignored by the Government, the problem of the witness caught between the legislative power to investigate and the judicial power to prosecute and convict. If the Fifth Amendment is the witness' only refuge, what becomes of his right to a fair trial – to be free from the introduction of evidence previously extracted and made available to the prosecution by another arm of government?

CONCLUSION

For these reasons, supplementing those in the petitions, certiorari should be granted.

Respectfully submitted,

Wm. Snow Frates	Eugene Gressman	John J. Wilson
Andrew C. Hall	William G. Hundley	Frank H. Strickler
Stuart Stiller	Plato Cacheris	Ross O'Donoghue
Lawrence H. Schwartz	Cary Mark Feldman	
Counsel for Petitioner Ehrlichman	*Counsel for Petitioner Mitchell*	*Counsel for Petitioner Haldeman*